IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 27TH JULY 2007 / 5TH SRAVANA 1929

SA.No. 453 of 1993()

AGAINST THE DECREE AND JUDGMENT DATED 20TH FEBRUARY, 1993 OF THE SUB COURT, SHERTHALLAI IN A.S.24/86 FROM THE DECREE AND JUDGMENT DATED 30TH SEPTEMBER, 1985 OF THE MUNSIFF'S COURT, SHERTHALLAI IN O.S.152/84.

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APPELLANTS:APPELLANTS:L.Rs OF 2ND DEFENDANT (ADDITIONAL DEFENDATNS 92 TO 101):

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1. **SAROJINI, THEKKATHARAYIL, CHERTHALA KIZHAKKUM MURI, KOKKOTHAMANGALAM VILLAGE.**

2. **SAROJINI MANONMANI, THANNEERPANTHAL VELIYIL, THANEERMUKKOM THEKKU VILLAGE, CHARAMANGALAM MURI.**

3. **SAROJINI CHANDRAMATHY, THEKKATHARA VEETTIL, KOKKOTHAMANGALAM VILLAGE, CHERTHALA, KIZHAKKUM MURI.**

4. **SAROJINI YESODHA, CHIRAKKATTU VEETTIL OF ...DO.....**

5. **SAROJINI AMMA, THARAYIL VEETTIL, VACHUR VILLAGE, VAIKKOM TALUK.**

6. **GOPALAN CHANDRA DAS, THEKKATHARAYIL, CHERTHALA KIZHAKKUM MURI, KOKKOTHAMANGALAM VILLAGE.**

7. **SAROJINI RANAVALLI OF ....DO....**

8. **GOPALAN RAJASEKHARAN OF ....DO....DO.....**

9. **GOPALAN ARAVNDAKSHAN OF ...DO..DO....**

10. **SAROJINI USHA OF ...DO..DO....**

BY ADV. SMT.C.G.BINDU

..2./-

SA.NO.453/1993

RESPONDENTS: RESPONDENTS:PLAINTIFFS 1 TO 10 AND DEFENDANTS AND LR.s OF CERTAIN DECEASED DEFENDANTS:

1. **VAVA BHUVANASWARAN, KALATHIL FROM POZHAKKARATHA-RAYIL, CHERTHALA KIZHAKKUM MURI, KOKKOTHAMANGALAM VILLAGE.**

2. **VAVA VISWANATHAN OF .....DO.....DO.....**

3. **PARU RUDRANI OF .....DO.....DO.....**

4. **BHASKARAN PUSHPANGADHAN OF ...DO..DO....**

5. **BHASKARAN CHANDRA DAS OF .....DO.....**

6. **BHASKARAN SALIM KUMAR OF ...DO..... (MINOR)**

7. **RUDRANI AISHA OF ....DO.....**

8. **RUDRANI SALILAMMA OF ....DO..DO.....**

9. **DHILEEP KUMAR OF ...DO..... (MINOR)**

10. **PRADEEP KUMAR, S/O. AISHA OF ....DO.... (MINOR)**

*11. **MADHAVAN VAVA, MADATHIPARAMBIL CHERTHALA VADAKKU VILLAAGE, VADAKKUM MURI.(D I E D) – LR's IMPLEADED:**

*12. **AYYARU VELAYUDHAN, VELIYIL VEETTIL, ALAPPUZHA VILLAGE, ...DO... MURI (D I E D) – LR's IMPLEADED:**

*13. **CHAKKI KALIKUTTY, PADMALAYATHIL, KALAVAMKODAM BHAGOM, VAYALAR KIZHAKKU VILLAGE, UZHUVA MURI. (D I E D) – LR's IMPLEADED:**

14. SANKARAN DIVAKARAN, EDAMURIYIL VEETTIL, VAYALARMEKKU VILLAGE, KADAKKARAPPILLY MURI.

15. SANKARAN BHASKARAN APPANAKATHU VEETTIL, OF ..DO..MURI.

16. SANKARAN SUKUMARAN, THATTUPURAKKAL VEETTIL OF ..DO....

17. KARTHIYAYANI SAROJINI, EDAMURIYIL VEETTIL OF ...DO.....

18. KARTHIYAYANI BHARGAVI KAKKAMUTHUMPARAMBIL VEETTIL OF ...DO.MURI.

19. KUMARAN SUKUMARAN OF ...DO....DO....

20. KUMARAN SURANDRAN OF ....DO...DO.....

21. KUMARAN PRASANNAN OF ...DO....DO.....

22. BHARGAVI BHASURA OF ...DO..DO.....

23. BHARGAVI SULOCHANA OF ...DO...DO....

24. KALIKKUTTY PANKAJAKSHI, PADMALAYATHIL KALAVAMCODEM, UZHUVA MURI, VAYALAR KIZHAKKU VILLAGE.

25. KALIKUTTY SAROJINI, RESIDING AT NIKARTHIL, KADAKKARAPPALLY MURI, VAYALAR MAKKU VILLAGE.

26. KESAVAN VIJAYAN, PADMALAYATHIL, VAYALAR KIZHAKKU VILLAGE, UZHUVA MURI, KALAVAMCODAM.

27. KESAVAN RAJAN OF ...DO...DO....

28. KESAVAN SOMAN OF ...DO....

29. PANKAJAKSHI VILASINI OF ...DO...DO....

*30. PANKAJAKSHI BHAMA OF ...DO..DO.... (REMOVED)

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* 31. KESAVAN SADEESAN, PADMALAYATHIL, VAYALAR KIZHAKKU VILLAGE, UZHUVA MURI, KALAVAMCODAM. (REMOVED)

32. VAVA SURANDRAN, NIKARTHIL VEETTIL, KADAKKARAPPALLI MURI, VAYALAR MAKKU VILLAGE.

33. VAVA BABU OF ....DO...DO.....

* 34. SAROJINI SATHI OF ...DO...DO.... (D-26))

)REMOVED

* 35. SAROJINI LALITHA OF ...DO...DO.....(D-27))

36.AYYARU SANKU RESIDING AT MATTATHIL FROM THEKKUTHARAYIL, CHERTHALA KIZHAKKUM MURI, KOKKOTHAMANGALAM VILLAGE (D-28)))) * DIED -)LR'S

37.AYYARU KRISHNAN, PUTHENPURAYIL OF ...DO...(D-29)IMPLEADED:)

38. KALI MADHAVI, VAZHATHARA VELIYIL, PALLIPPURAM MURI, ..DO... VILLAGE (D-30))

39. NEELAKANDAN SREEDHARAN, THEKKATTATHU VEETTIL, ARIYADU VADAKKU VILLAGE, MANNAMCHERY MURI (D-31)

40. NEELAKANDAN MANOHARAN OF ..DO..DO.... (D-32)

41. KOCHUPENNU PADMAKSHI OF ...DO...DO....(D-33)

42. KOCHUPENNU VASUMATHI, KOLLAMPARAMBIL, PERUMTHURUTH MURI, THANNERMUKKOM THEKKU VILLAGE (D-34).

43. KOCHUPENNU AMBUJAKSHI, THEKKAATTATHU VEETIL, MANNAMCHERERY MURI, ARYAD VADDKU VILLAGE (D-35).

44. KOCHUPENNU THANKAMMA OF ...DO.. (D-36)

45. PADMAKSHI SULOCHANA OF ...DO..... (D-37)

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46. PADMAKSHI MRINALINI, THEKKAATTATHU VEETTIL, MANNAMCHERRY MURI, ARYAD VADAKKU VILLAGE (D-38).

47. DIVAKARAN MANIAN OF ...DO.... (D-39).

48. VASUMATHI AMBIKA, KOLLAMPARAMBIL, PERUMTHURUTHU MURI, THANNEERMUKKOM THEKKU VILLAGE (D-40).

49. DAMODARAN VISWAMBHARAN OF ...DO.... (D-41).

50. DAMODARAN THILAKAN OF ...DO..... (D-42)

51. DAMODARAN DINASAN OF ...DO... (D-43)

52. THANKAMMA ANITHA, THEKKAATTATHU VEETTIL, MANNAMCHERRY MURI, ARYAD VILAGE (D-44) (MINOR)

53. VISWAMBHARAN BABU OF ...DO.... (D-45)

54. VISWAMBHARAN SANTHOSH OF ..DO.. (D-46) (MINOR)

55. VISWAMBHARAN SUNHASH OF ...DO...(MINOR) (D-47)

56. VAVA PADMANABHAN, VAZHATHARA VELIYIL PALLIPPURAM MURI, PALLIPPURAM VILLAGE. (D-48)

57. VAVA CHIDAMBHARAN OF ...DO...DO.... (D-49) – LR'S R.38.

* 58. VAVA KARTHIKEYAN OF ...DO..DO... (D-50) (REMOVED)

59. VAVA SARNGAN OF ...DO...DO.... (D-51))
)
60. VAVA VISWAMBHARAN OF ...DO.... (D-52))
)LR'S OF R38.
61. MADHAVAI AMBUJAKSHI OF ..DO... (D-53)).....)
62. MADHAVI PADMAKSHI VADAKKU PURATHU VEETTIL,) THANNERMUKKOM MURI, ...DO.. VILLAGE (D-54))

63. AMBUJAKSHI ASSAMMA, VAZHATHARA VELIYIL, PALLIPPURAM MURIYIL, PALLIPPURAM VILLAGE (D-55)(MINOR)

64. AMBUJAKSHI ISSAMMA OF ...DO.. (MINOR) (D-56).

65. AMBUJAKSHI MARIYAMMA OF ...DO.... (MINOR) (D-57).

66. AMYAPPAN, S/O.AMBUJAKSHI OF ..DO... (MINOR) (D-58)

67. PADMAKSHI RAMANI, VADAKKUPURATHU VEETTIL, THENNEERMUKKOM MURI, THANNEERMUKKOM VADAKKU VILLAGE (D-59).

68. KESAVAN SOMAN OF ..DO... (D-60).

69. KESAVAN MANOHARANOF ...DO... (MINOR) (D-61).

70. KESAVAN MOHANAN OF ...DO.. (MINOR) (D-62).

71. KESAVAN UTHAMAN OF ...DO.. (MINOR) (D-63).

72. KESAVAN SIDHARTHAN OF ...DO... (MINOR) (D-64).

73. KESAVAN AJAYA KUMAR OF ...DO... (MINOR) (D-65)

74. MADHAVAN PADMANABHAN, POIKKARAMTHARAYIL, THERTHALA KIZHAKKUM MURI (D-66).

75. MADHAVAN NARAYANAN OF ...DO... (D-67).

76. PARVATHI KARTHIYAYANI, NIKARTHIL, MARUTHORVATTOM MURI, THANNEERMUKKOM VADAKKU VILLAGE (D-68).

77. PARVATHI JANAKI, THARAYIL, CHARAMANGALAM MURI, KANJIKUZHI VILLAGE (D-69).

78. PARVATHI BHARGAVI, KATTUKANDATHIL, CHERTHALA KIZHAKKUM MURI, VARNATTU BHAGOM (D-760).

79. PARVATHI MEENAKSHI, NIKARTHIL MARUTHORVATTOM MURI, THANNEERMUKKOM VADAKKU VILLAGE (D-71).

80. PARVATHI DEVAKI, PAZHAMKULANGARA MATTATHIL CHERTHALA KIZHAKKUM MURI CHAVASSERY BHAGOM (D-72).

81. KUNJUNNI BHASKARAN, KALATHIL OF ...DO.. MURI (D-73).

82. KUNJI MADHAVI, MANJANATTUTHARAVYIL, PADINJARAKKARA MURI, VAIKOM NADUVILA MURI VILLAGE (D-74).

83. MADHAVI DAKSHAYANI OF ...DO..DO... (D-75).

84. MADHAVI RADNAMMA OF ...DO.. DO..... (D-76).

85. VALU DIVAKARAN, MANNAMTHADATHIL VEETTIL, KALLOOPPARA VILLAGE, ..DO... MURI, THIRUVALLA TALUK (D77)

86. LAKSHMI THANKAMMA OF ...DO... (D-78).

87. PADMAKSHI, PADMALAYATHIL, VAYALAR KIZHAKKU VILLAGE, UZHUVA MURI (D-79).

88. PARAMESWARAN SOMAN OF ...DO.... (D-80).

89. PARAMESWARAN PRAKASH OF ..DO.... (D-81).

90. PADMAKSHI SOJA OF ...DO... (D-82).

91. PADMAKSHI VIJAYAMMA OF ...DO.... (D-83).

*92. PADMAKSHI MOLI OF ...DO....(D-84).(REMOVED).

93. PADMAKSHI AMBIKA OF ...DO.... (D-85)

94. PADMAKSHI SALI OF ...DO.... (D-86)

95. SUMATHI D/O.KARTHIYAYANI, THAYYIL, KADAKKARAPPALLY MURI, VAYALAR MAKKU VILLAGE (D-88).

96. KARTHIYAYANI BHARANAMMA, THATTUPURAKKAL, ..DO... MURI FROM ...DO...DO.... (D-89).

97. SORNAMMA, D/O.KARTHIYAYANI, KIZHAKKA PANAKKAL OF ...DO.... MURI FROM THAYIL OF ...DO.....DO... (D-90).

98. MANIYAN, S/O.KOCHUKUTTY, RESIDING AT THAYIL VEETTIL OF ...DO... MURI (D-91).

(RESPONDENTS 11 TO 98 ARE THE DEFENDANTS AND ADDITIONAL DEFENDANTS)

(MINORS R6 REPRESENTED BY R3 AND MINORS R9,10 REPRESENTED BY R7 MINORS R52, 54 AND 55 REPRESENTED BY R44, MINORS R63 TO 66 REPRESENTED BY R61. MINORS R69 TO 73 REPRESENTED BY R.62). ADDRESS OF THE APPELLANTS ARE THAT OF THEIR COUNSEL P.H.SANKARANARAYANA IYER AND BINDU.C.G., "SREENIKATAN" AMMENKOVIL ROAD, ERNAKULAM, COCHIN – 35 AND ADDRESSES OF THE RESPONDENTS ARE AS SHOWN ABOVE).

*ADDL.R99 TO R127 ARE IMPLEADED:

R99. VIJAYAN, AGED 45 YEARS, MADATHIPARAMBIL HOUSE, VADAKUM MURI, VELARVATTOM, CMC – 24, SHERTALLAI.

R100. MADHAVI PONNAMMA, AGED 40 YEARS, VALIYIL HOUSE, KARINJIPPADOM SHERTALLAI, VADAKKUM MURI.

R101. MADHAVI THANKAMANI, AGED 38 YEARS, KODIPURACKAL, PERUNTHOR, MANGALAM MURI, SHERTALLAI – VADAKKUM MURI (LR'S OF DECEASED R11-MADHAVAN VAVA).

**R102.VELAYUDHAN MANIYAN, AGED 39 YEARS, PUTHEN PURACKAL, KOMALAPURAM P.O. ALLEPPEY (DELETED).

**R103.MANIYAMMA, AGED 37 YEARS, VARNEPPARAMBIL, PUNNAPRA P.O., ALLEPPEY (DELETED).

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**R104.PRASANNA, 35 YEARS, PUTHIYA PURAYIL HOUSE,
PALLOTHURUTHIL, ALLEPPEY. (DELETED).

R105. VELAYUDHAN BHARGAVAN, 32 YEARS,
VELIYIL HOUSE, AVALOOKUNNU P.O., ALLEPPEY.(DELETED).

R106. VELAYUDHAN RAMESAN,AGED 30 YEARS,
KOLLATHUSERRY HOUSE, THAICKAL P.O., ARTHUNKAL.
(LRS OF R12 AYYARU VELAYUDHAN).

R107. MOHANAN, 36 YEARS, THATTUPURACKAL,
KADAKKARAPPALLI MURI, SHERTALLAI.

**R108.SEETHAMMA, AGAED 30 YEARS, THATTUPURACKAL,
KADAKKARAPPALLI MURI, SHERTALLAI. (DELETED).

R109. JOSHI, AGED 26 YEARS, THATTUPURACKAL,
KADAKKARAPPALLI MURI, SHERTALLAI.

**R110.MOLLY, 24 YEARS, THATTUPURACKAL,
KADAKKARAPPALLI MURI, SHERTALLAI. (DELETED).

R111. LAKSHMI, W/O.LATE SANKU,
AGED 72 YEARS, MATTATHIL HOUSE,
KOKKOTHAMANGALAM, P.O.KIZHAKKEMURI, SHERTALLAI.

**R112.VISWANATHAN, AGED 50 YEARS,
RESIDING AT CHALLIYIL FROM MATTATHIL,
KIZHAKKEMURI, SHERTALLAI (DELETED).

**R113.RAVEENDRAN, AGED 44 YEARS,
RESIDING AT PEEDIKACHIRAYIL FROM MATTATHIL,
KIZHAKKEMURI, SHERTALLAI. (DELETED).

**R114.PEETHAMBARAN, AGED 40 YEARS,
RESIDING AT MATTATHIL HOUSE, KIZHAKKEMURI,
SHERTALLAI. (DELETED).

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**R115. SATHI, 48 YEARS, W/O.KARTHIKEYAN,
PEEDIKAKARAYIL, CHENGANDA, VARANAD P.O.,
SHERTALLAI (DELETED).

R116. SUMATHI, AGED 46 YEARS,
VADAKKEVEETTIL, NEDUMPURAKKAD KARA,
SHERTALLAI. (LRS OF R 36 – AYYARU SANKU)

R117. BHAVANI, 68 YEARS, W/O.LATE AYYARU KRISHNAN,
PUTHANPURA, KOKKOTHAMANGALAM,
P.O.SHERTHALLAI.

R118. BALAKRISHNAN, 48 YEARS, ..DO....DO....

R119. RADHA, 42 YEARS,
KOLOTHUVELI, THIRUMETTOOR P.O., SHERTHALLAI.

R120. SOMINI, 41 YEARS,
VALIAPARAMBIL, THIRUMETTOOR P.O., SHERTHALLAI.

**R121. VIMALA, 38 YEARS, VELIYIL KALAVOOR P.O.,
ALLEPPEY – 688 522. (DELETED).
(LRS OF R 37 – AYYARUKRISHNAN)

R122. DIVAKARAN, 44 YEARS,
POTHUNIKARTHIL FROM KATTUKANDATHIL,
VARANAD P.O., SHERTHALLAI.

R123. VIJAYAN, 38 YEARS OF .....DO....DO.....

R123. KAMALAN, AGED 32 YEARS, KATTUKANDATHIL,
VARANAD, P.O.SHERTHALLAI.

R124. SOMAN, 36 YEARS, POTHUNIKARTHIL FROM
KATTUKANDATHIL, VARANAD P.O., SHERTHALLAI.

R125. KARTHIKEYAN, AGED 28 YEARS,... OF ...DO..DO..

R126. RADHAKRISHNAN, AGED 24 YEARS, ...OF..DO...DO....

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R127. KUMARI, AGED 26 YEARS, KORIYIL HOUSE,
UZHAVAMURIYIL, VAYALAR P.O., SHERTHALLAI.
(LRS OF R 78 PARVATHI BHARGAVI)

* NAMES OF R30,R31,R34,R35, R58 & R92 ARE DELETED FROM THE PARTY ARRAY AS PER ORDER DATED 24/07/96 IN CMP.NO.915/1996.

*ABOVE RESPONDENTS R 99 TO R 101 IMPLEADED AS THE LEGAL HEIRS OF DECEASED R 11TH RESPONDENT, R102 TO R106 IMPLEADED AS THE LEGAL HEIRS OF DECEASED R 12 RESPONDENT, R 107 TO R 110 IMPLEADED AS THE LEGAL HEIRS OF DECEASED R 16TH RESPONDENT. R 111 TO R 116 IMPLEADED AS THE LEGAL HEIRS OF DECEASED R36 RESPONDENT. R 117 TO R 121 IMPLEADED AS THE LEGAL HEIRS OF DECEASED R37 RESPONDENT, R 122 TO R 127 IMPLEADED AS THE LEGAL HEIRS OF DECEASED R 78 RESPONDENT. LRS OF R 82 IS ALREADY IN THE PARTY ARRAY AS RESPONDENTS 83 AND 84. LRS OF R 38 IS ALREADY IN THE PARTY ARRAY AS RESPONDENTS 56,57,58,59,60,61 AND 62, AS PER ORDER DTD. 20/12/96 IN THE CMP.NO.1449/94 IN S.A.NO.453/93. R122 AND R123 ARE IMPLEADED AS THE LRS OF R13.

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** R102, R103, R104, R108, R110, R112, R113, R114, R115 AND R121

ARE DELETED FROM PARTY ARRAY AS PER ORDER DATED

20/12/1996 IN C.M.P.NO.1901/1996 IN S.A.NO.453/93.

BY ADV. SRI V N SWAMINATHAN
SRI.S.DILEEP

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 27/07/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NOS.1090/1993 AND 310./1994 IN SA.NO.453/1993

DISMISSED

27/07/2007 **SD/-M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.S.TO JUDGE

Kss

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 453 OF 1993

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Dated this the 27th day of July, 2007

JUDGMENT

Munsiff Court, Shertallai passed a preliminary decree for partition directing division of plaint schedule property into 80 equal shares and allotment of ten such shares to plaintiffs and 41 shares to defendants 1, 4, 30 to 65 and 73 to 78. Legal heirs of second defendant who were additional defendants 92 to 101 challenged the preliminary decree before Sub Court, Shertallai in A.S.24/1986. Learned Sub Judge confirmed the preliminary decree and dismissed the appeal. It is challenged in the Second Appeal.

2. Second appeal was admitted on 20.7.1993, without formulating substantial questions of law. Hence hearing the arguments of both counsel the following substantial questions of law were formulated.

1) When under Ext.A4 decree in O.S.414/1122

the mortgage was redeemed by second defendant and his mother, whether suit for partition by a non-redeeming co-mortgagor is maintainable?

2) When after redemption the property was taken delivery under Ext.A5 on 5.1.1953 whether the suit filed in 1984 is barred by time?

3) Whether in view of Ext.B2 judgment in O.S.50/1971 the claim for partition is barred?

4) When under Ext.B2 judgment dated 17.1.1980 the claim for partition was rejected, whether suit for partition filed in 1984 is barred by time?

3. Learned counsel appearing for appellants and respondents were heard on the substantial questions of law formulated thereafter.

4. Plaintiffs are the children and grandchildren of Cheera Paru, the 22nd executant of Ext.A1 partition deed whereunder tharwad properties were divided into four sakhas. Executant Nos.1 to 7 are members of the first sakha. Executant Nos. 8 to 14 are members of second sakha and executant No.15 to 25 are members of third sakha and

executant No.26 to 28 are fourth sakha. Plaintiffs and defendants are admittedly members of third sakha. Under Ext.A1 partition deed, item No.1 was allotted to first sakha and item No.2, which is the plaint schedule property, was allotted to sakha Nos. 2 to 4. But even at the time of Ext.A1 partition deed, the said property was outstanding in the possession of a mortgagee as per registered mortgage of 1082. Ext.A1 provides for redemption of the mortgaged property and division among the sharers. It also provides that if the karanavan of the sakha failed to redeem the mortgage, any member of the shakhas is entitled to redeem the same. On the allegation that karanavan of the sakhas were colluding with the mortgagee and are trying to avoid redemption before the expiry of the period of limitation, second defendant and his mother filed O.S.414/1122 M.E seeking a decree for redemption. Ext.A2 the certified copy of the plaint establishes the case. Under Ext.A3 judgment dated 10.7.1951 and Ext.A4 decree, a decree for

redemption was passed. Under Ext.A5, after redemption, delivery of property was taken on 5.1.1953. Thereafter O.S.50/1971 was filed by the members of sakha No.2 and 4 impleading karanavan and some of the members of the third sakha as defendants, seeking a decree for partition on payment of proportionate mortgage amount due from them on the allegation that the mortgage was redeemed for the benefit of all the members of the tharwad. In that suit plaintiffs 1 to 3 herein were defendants 4 to 6. Second defendant was the first defendant and first defendant, the third defendant. Second defendant herein in that suit contended that redemption of the mortgagee was not for and on behalf of all the sakhas and the claim for partition is barred by limitation and all the members of the tharwad are necessary parties and in the event of partition, he is entitled to the value of improvements effected by him. A preliminary decree was passed by the trial court which was confirmed by the first appellate court.

It was challenged before this Court in S.A.134/1975. This court under Ext.B2 judgment dated 17.1.1980, set aside the preliminary decree and dismissed the suit holding that the suit is barred by limitation as the suit was filed beyond the period of limitation. The present suit was filed by the plaintiffs who are members of the third shakha impleading the defendants who are the other members of the thavazhi claiming partition of the plaint schedule property contending that decree for redemption shall enure to the benefit of the third sakha and therefore they are entitled to get their respective shares separated. Second defendant resisted the suit contending that redemption under Ext.A4 decree was not for the members of the third sakha but was for the second defendant and his mother on their own right and therefore plaint schedule property is not available for partition. It was also contended that no decree for redemption could be passed now as it is barred by limitation and therefore the

property is not available for partition. It was also contended that the suit is not maintainable as it is barred by res judicata in view of the decree and judgment in O.S.50/1971 as modified by this court under Ext.B2 judgment. It was further contended that in any case the claim is barred by limitation.

5.Learned Munsiff on the evidence of DW1 and Exts.A1 to A5 and B1 to B4 held that redemption under Ext.A4 decree was for and on behalf of the third sakha and therefore it shall ensure to the benefit of all the members of that sakha and hence plaintiffs are entitled to their share in the plaint schedule property. A preliminary decree was passed. First appellate court also confirmed the findings of the learned Munsiff that suit is not barred under Ext.B2 judgment, finding that it was not a suit in between the members of the third sakha and instead a suit by members of sakhas 2 and 4 against the third sakha and therefore Ext.B2 judgment will not operate as res judicata. Learned

Sub Judge also found that under Ext.A4 a decree for redemption was obtained as provided under Ext.A1, whereunder any member of the shakha is entitled to redeem the mortgage and once it is redeemed , it shall be available to all the members of the sakha and therefore plaintifss are entitled to the share granted by the trial court. Appeal was dismissed. It is challenged in the second appeal.

6.Learned counsel appearing for appellants and respondents were heard.

7. The argument of the learned counsel appearing for appellants was that O.S.414/1122 was filed by second defendant and his mother on the specific allegation that none of the karanavans of the respective sakhas were taking steps to redeem the mortgage and they were in fact colluded with the mortgagee and redemption was obtained under Ext.A4 decree and it will not enure to the benefit of the other members of the tharwad including third shakha and shall only enure to the benefit of second defendant and his mother. It was also

argued that as far as the non-redeeming co-mortgagor is concerned, he is only entitled to claim a right, if the claim is made within the period of limitation.

8. In view of the settled legal position learned counsel appearing for appellants admitted that a co-mortgagor who redeems the mortgage will not step into the shoes of the mortgagee and instead would only be a surety with regard to the share of other non-redeeming co-mortgagors. But it was argued that remedy of the non-redeeming co-mortgagors is barred by limitation as the suit was not instituted within three years from the denial of the right for a share in the plaint schedule property. Learned counsel also argued that Ext.B2 judgment in S.A.134/1975 establish that the right and share claimed by plaintiffs and other members of tharwad were denied by the second defendant, who contended that he redeemed the mortgage on his behalf alone and therefore Ext.B2 judgment would atleast operate as a notice of denial of the right

as against the other members of the tharwad and as no suit was filed within three years from 17.1.1980, the date of the judgment, the suit is barred under section 113 of Limitation Act, 1963 (Section 120 of Limitation Act 1908 corresponding) . Learned counsel appearing for appellants relied on the decision of the Apex Court in **Krishnal Pillai v. Padmanabha Pillai (2004(2) KLT 61)** and argued that eventhough a suit for partition alone is maintainable, as the suit was not filed within the period of limitaiton, the decree granted by the courts below are unsustainable. Learned counsel then argued that even if the decree is to be upheld, considering the number of shares and the extent of the property and the fact that it was the original second defendant who redeemed the mortgage and effected the improvements, there may be a direction that in the final decree application instead of dividing the property sufficient safeguard be made to protect

the interest of the appellants.

9. Learned counsel appearing for contesting respondents argued that O.S.50/1971 was not a suit in between the members of the third sakha and instead a suit by two sakhas against the third sakha and therefore as rightly found by courts below, the said decree and judgment will not operate as barred by res judicata as against the members of third sakha to claim partition. Learned counsel also argued that as held by the Apex Court in **Krishna Pillai's case (supra)** position of a redeeming co-mortgagor is only that of surety and he can only claim contribution from other non-redeeming co-mortgagors and a suit for partition is maintainable. It was also argued that Ext.B2 judgment will not operate as a notice of denial of the right of the plaintiffs or other members of the third shakha as the claim for partition in between the members of third sakha was not a question that was considered or decided in O.S.50/1971 and therefore Ext.B2 judgment will not

operate as a notice to compute the period of limitation from the date of that judgment. It was also argued that in the plaint it was specifically averred that the cause of action is the refusal of the defendant to give share of the plaintiffs on 30.12.1983 and therefore the period of limitation could only be computed from that date and as the suit is filed within the period, it is perfectly maintainable and the appeal is only to be dismissed.

10. The question whether a redeeeming co-mortgagor could claim the status of a mortgagee or is only a surety as against the non-redeeming co-mortgagor is no more res integra as settled by the Apex Court in various decisions. In Krishna Pillai's case (supra) analysing all the earlier decisions including **Ganeshi Lal v. Joti Pershad (1953 SCR 243), Saraswathi & another v. Eachampi Thevi & Ors (1993) Suppl.2 SCC 201).** The legal position has been summarised that when a co-

mortgagor pays more than his share to the creditor for the purpose of redeeming a mortgage, the redeeming mortgagor is principal debtor to the extent of his share of the debt and a surety to the extent of the share in the debt of other co-mortgagors and redeeming co-mortgagor being only a surety for the other co-mortgagors, his right is only a right for reimbursement or contribution. It was also held that the substitution of the redeeming co-mortgagor in place of the mortgagee does not place the redeeming co-mortgagor in the place of original mortgagee and the doctrine of subrogation must be applied along with other rules of equity so that the person who discharges the mortgage is amply protected and at the same time there is no injustice done to the other joint debtors. It was also held that once the mortgage is redeemed by one of the co-mortgagors, a suit for partition by the non-redeeming co-mortgagor is maintainable and there need not be a prayer for redemption of the mortgage, which has already been

redeemed. The question of limitation was also finally settled in para 22 as follows:-

> "In our opinion, the suit filed in the present case being a suit for partition primarily and predominantly and the relief of redemption having been sought for only pursuant to the direction made by the High Court in its order of remand, the limitation for the suit would be governed by Art.120 of Limitation Act, 1908. For a suit for partition the starting point of limitation is - when

the right to sue accrues, that is, when the plaintiff has notice of his entitlement to partition being denied. In such a suit, the right of the redeeming co-mortgagor would be to resist the claim of non-redeeming co-mortgagor by pleading his right of contribution and not to part with the property unless the non-redeeming co-mortgagor had discharged his duty to make contribution. This equitable defence taken by the redeeming

> co-mortgagor in the written statement would not convert the suit into a suit for contribution filed by the non-redeeming co-mortgagor."

Therefore the legal position is that though second defendant and his mother redeemed the mortgage under Ext.A4 decree, they cannot claim the status of a mortgagee. Their right is only by way of rights akin to those vesting in the mortgagee. They cannot defeat the legal claim for partition, though they can insist that such legal right claimed by the other co-mortgagor is subject to the right of the exercise of equitable right vesting in them by subrogation. They can claim only contribution of the share of the non-redeeming co-mortgagor.

11. Ext.A1 enables even without invoking the provision of 91 of the Transfer of Property Act, to

one member of any of the sakhas to redeem the mortgage which was created in 1082 M.E. Once invoking the right provided under Ext.A1, a suit was instituted by second defendant and his mother and obtained redemption the legal consequence is that they are the co-mortgagors who redeemed the mortgage. Their status could only be as a surety and their rights are akin to those vesting in the mortgagee. Hence they can only claim contribution of the share of mortgage money due from other sharers. Therefore finding of the courts below that plaintiffs are entitled to claim their share is sustainable provided the suit is within the period of limitation.

12. As Article 113 of Limitation Act, 1963 corresponding to Section 120 of Limitation Act 1908 is applicable, a suit for partition should have been instituted within three years from the date, when the cause of action has arisen. The argument of learned counsel appearing for appellants is that the cause of action has arisen atleast on the

date of Ext.B2 judgment as the denial of the right therein would operate as a notice of denial of the right and share of the plaintiffs. The question is whether it is so. On going through Ext.B2 judgment, I cannot agree with the submission of learned counsel appearing for appellants that it would operate as a denial of the rights of any of the members of the third sakha. O.S.50/1971 was filed by members of second and fourth sakha claiming partition contending that redemption by the third sakha was for and on behalf of all the other members of sakhas. The contention of the appellants was that the redemption was not for the benefit of members of other sakhas. Ext.B2 does not show that there was any pleading by the second defendant herein against the members of the third sakha or their claim for a share. If the written statement filed by the second defendant was produced in the suit atleast whether such a contention was raised would have been known. But when the pleading is not there and what is

available is only Ext.B2 judgment, this aspect can be decided only from Ext.B2 judgment. Ext.B2 does not show that in that suit the question whether redemption was for the second defendant alone, who was the first defendant in that suit, or for all the members of the third sakha was not raised or considered. If that be so, the dismissal of that suit under Ext.B2 judgment, will not operate as a notice of denial of the right of plaintiffs as members of the third sakha. Hence the suit is not barred by him as canvassed by learned counsel appearing for appellants. Case of appellants is that their right for a share in the plaint schedule property was denied only in December 1983. Hence the decree for partition is perfectly correct. But as rightly pointed out by learned counsel appearing for appellants, the partition could be claimed only after paying the contribution due from the other sharers. Therefore before alloting shares in the final decree the other non redeeming co-mortgagors have to deposit their share of the

mortgage money, which was paid by second defendant for redemption of the mortgage of 1082. To that effect the preliminary decree has to be modified. As pointed out by the learned counsel for appellant considering the number of shares and the extent of the property and the fact that second defendant after redemption of the mortgage under Ext.A4 decree effected the improvements, at the time of passing the final decree, court has to be work out the equities considering all these aspects including the question whether instead of actually dividing the property it would be appropriate to adopt some other mode of satisfying the claims of the parties as held by the Apex Court in Krishna Pillai's case (supra).

The second appeal is allowed in part. Preliminary decree granted by the trial court is confirmed with the following modification:- Before getting the shares allotted, under the preliminary decree, the sharers have to deposit their share of the mortgage money, which was

deposited by second defendant and only thereafter plaintiffs or other sharers could claim separation and allotment of their shares. At the time of passing of the final decree, the court has to work out the equities and also to decide whether instead of dividing the property it would be more appropriate to adopt some other mode of satisfying the claim of other shares.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.453 /1993

JUDGMENT

27TH JULY, 2007